No. 96

IN THE

Supreme Court of the United States

October Term, 1963

YVETTE M. WRIGHT, HORACIO L. QUINONES, DARWIN BOLDEN, BENNY CARTEGENA, RAMON DIAZ, JOSEPH R. ERAZO, BLORNEVA SELBY, WALSH McDERMOTT, SETH DUBIN, all individually and on behalf of all other persons similarly situated, *Plaintiffs-Appellants,*

—against—

NELSON A. ROCKEFELLER, Governor of the State of New York, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, JOHN P. LOMENZO, Secretary of State of the State of New York, and DENIS J. MAHON, JAMES M. POWER, JOHN R. CREWS and THOMAS MALLEE, Commissioners of Elections constituting the Board of Elections of the City of New York, *Defendants-Appellees,*

—and—

ADAM CLAYTON POWELL, J. RAYMOND JONES, LLOYD E. DICKENS, HULAN E. JACK, MARK SOUTHALL and ANTONIO MENDEZ,
Defendants-Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

Many of the arguments contained in the Briefs for the Appellees Rockefeller, Lefkowitz and Lomenzo ("State Br.")* and the Intervenor-Defendants ("Intervenor Br.") were made by the State in its Motion to Dismiss or Affirm

*Page references in this Reply Brief not otherwise identified refer to the State Brief.

("Motion to Dismiss").* Appellants therefore respectfully refer the Court, for the detailed refutations of these old arguments, to their brief opposing the Motion to Dismiss, as well as to their other papers filed herein.

However, after asserting in the Motion to Dismiss that the decision below was "a purely factual determination" (p. 8), the State now presents this case as one in which the Court *must* decide (a) that, despite the overruling of *Plessy* v. *Ferguson*, 163 U. S. 537 (1896), the Constitution still permits state legislatures to enact statutes which have the purpose and effect of segregation, and (b) that, except in situations which are not entirely clear from the State's Brief, the courts are barred from even entertaining suits challenging such segregation when it occurs as part of the process of creating governmental entities like Congressional districts. Further, after both the State (Motion to Dismiss 13-14) and the Intervenors (Intervenor Br. 14-15) contended that Appellants could not indicate a reason why the Legislature might have desired to gerrymander racially as part of the process of creating separate Congressional Districts,** the State now postulates existence of a desire, and a right, to gerrymander racially to effectuate a form of "separate-but-better-off" theory. Finally, the State, though arguing that the Court must uphold these justifications of racial gerrymandering, attempts to rewrite the record below and to argue that this case does not involve such gerrymandering.

This reply attempts to discuss these novel propositions and several others asserted in the State Brief, and to place

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*The Intervenor-Defendants did not oppose review by this Court.

**The Intervenors make this contention despite the assertions in their intervening answer "[t]hat 99% of all Negroes and Puerto Ricans holding office [presumably in the Borough of Manhattan] are elected from the Eighteenth Congressional District . . . [and t]hat Negroes and Puerto Ricans now control at least one Congressional District . . ." (R. 17)

in perspective the facts and issues actually presented for decision in this case.

THE CONSTITUTIONAL QUESTION PRESENTED AND THE STANDARDS FOR DECIDING IT

Appellants contend (Appellants' Br. 18-21, 30-33) that this case, although slightly different in its factual pattern, follows in the mainstream of segregation cases which this Court has been called upon to decide and must be resolved in Appellants' favor under the principles derived in these cases from the 14th Amendment's "equal protection" requirement.

The basic principle, simply stated, is that a state legislature may not, without violating the 14th Amendment, engage in state action which has the purpose and effect of racially segregating individuals into separate entities—be they schools, sides of a courtroom or Congressional Districts. In the District Court in this case two of the three judges agreed with this principle (R. 165, 171). Further, as long ago as *Buchanan* v. *Warley,* 245 U. S. 60 (1917), this Court rejected the notion that supposed benefit to the group being segregated could justify purposeful segregation. Moreover, at least one lower court has held that even where the effect is *integration,* the use of state machinery to enforce a plan which utilizes race as a criterion is equally unconstitutional. *Progress Development Corp.* v. *Mitchell,* 182 F. Supp. 681 (N. D. Ill. 1960), *reversed on other grounds,* 286 F. 2d 222 (7th Cir. 1961). Finally, this Court has never accepted the argument, which the State's Brief presents, that the courts should declare non-justiciable an entire class of cases in which Negroes could prove racial segregation, since the 14th Amendment, "while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination

against them [citations omitted]." *Nixon* v. *Herndon*, 273 U. S. 536, 541 (1927).

In the face of this line of precedent the State contends, without citing authority, that it may, consistent with the 14th and 15th Amendments, deliberately "classify people by race" (State Br. 20, 37, 38), and "decide to concentrate a racially homogeneous neighborhood in one Congressional district, instead of dividing it among several districts" (*id.* 38). Further, because

> "it is a matter of judgment in the particular case whether the minority will be advantaged most by concentrating its strength in one district or by dispersing its forces among several districts" (*id.* 38),

the Courts may not, the State contends, review complaints which allege that the minority has been, in fact, severely disadvantaged by the action of the legislature in question (*id.* 41-47). The State does, to be sure, suggest that such action be permitted only in pursuance of a "legitimate purpose" (*id.* 37), but it renders this statement meaningless by contending that the courts should not entertain a claim that the particular districting has failed to fulfill the lofty purpose of aiding the complaining minority, because:

> "The courts have no touchstone for deciding when a minority is better off by having its voters concentrated in one neighborhood and when it gains an advantage by being divided among several districts" (*Id.* 21).

The fundamental problem with this plea for State freedom to manipulate citizens on racial grounds, unrestrained by court scrutiny, is that it would give state legislatures throughout the country a dangerous power to destroy the protections of the 14th and 15th Amendments in an area (voting rights) essential to achievement of minority group equal status in the community. Even if one could assume

arguendo that the New York State Legislature, in enacting Chapter 980 at a two-day special session, without hearings, debate or other legislative history, deliberately drew racially gerrymandered district lines solely to *benefit* the Negroes and Puerto Ricans on Manhattan Island, one would clearly be required to strain to make even an *arguendo* assumption such as this in all other states. And, since states cannot possibly use racial classifications for the purpose of benefitting particular racial groups without thereby disadvantaging other such groups, it should be recognized that abstention would leave these groups, too, without the opportunity for court relief against denials of equal protection.

The State seems to seek support for its contention that this Court could, consistent with the 14th and 15th Amendments, leave to state legislatures the unbridled power to play racial roulette with voters by blandly asserting that it had "no reason" for jamming the vast majority of the Negroes and Puerto Ricans on Manhattan Island into a single district (p. 32).

However, at least two reasons can be suggested, neither of which appears remotely permissible under the 14th or 15th Amendments. The first is to effectuate a desire to destroy the effective voting power of these minority groups, in varying degrees, in the other three districts. Although the State Brief reiterates at various points that one of Appellants' hypotheticals contained two adjoining districts with 9.5% and 58.9% Negroes and Puerto Ricans (p. 13), it conveniently ignores the fact that this same hypothetical districting produces a third district in which the Negroes and Puerto Ricans would constitute 59.1% of the population (R. 89, 210). Thus, this hypothetical districting, from which the State for some reason feels it can draw comfort, posited the possibility that were Congressional district lines on Manhattan Island drawn without regard to race and national origin, Negroes and Puerto Ricans, constitut-

ing nearly 40% of the total population, would be the majority in districts electing two of the Island's four Congressmen (R. 89, 210).

A second possible reason for a racial gerrymander of this type might be to perpetuate in power a particular minority group leader or leadership clique and to prevent rivals of the same or another minority group from effectively reaching the electorate in separate districts. The State suggests that there is in Manhattan *"a* minority" and *"a* racially homogeneous" neighborhood (pp. 38-40), a suggestion contrary to the State's own statement that in Harlem there is both a Negro *and* a Puerto Rican community (p. 45). This suggests that the gerrymander in this case may well be designated to foreclose the Puerto Ricans from effective political power in both the 17th and 18th Districts and to ensure the continued political "control" of the larger Negro group in the 18th.

The necessary underpinning of the State's novel constitutional argument is the wholly falacious premise that the states "cannot possibly avoid" deliberate racial gerrymandering (p. 37). While it may be true that state legislatures will, to a greater or less degree, be aware of the effect upon various racial groups of particular enactments, it is quite a different thing to say that they must inevitably act so as deliberately to gerrymander on racial lines.

Moreover, Intervenors concede that there are "reasonable" criteria or rational bases apart from race which a legislature could use in the course of redistricting (Intervenor Br. 13). The State in its Motion to Dismiss also mentioned a number of alternative criteria (p. 12). Finally, Appellants introduced proof of an additional "neutral" criterion—namely, the use of regular geometric divisions of the Island, with major streets and the borders of Central Park as dividing lines, to achieve reasonable equality in

population. In light of all of these suggestions as to non-racial criteria which could be utilized, it is incredible at this stage for the State to argue that the use of racial criteria is inevitable.

It thus being possible for a legislature (a) very badly to disadvantage a minority group by Congressional districting which uses race as a criterion, and (b) to use criteria other than race, there is no reason for this Court to carve out of the 14th and 15th Amendments an exception which would permit purposeful segregation in this area. Rather, the statements of Mr. Justice Whittaker in *Gomillion* v. *Lightfoot*, 364 U. S. 329, 349 (1960) that

> "fencing Negro citizens out of Division A and into Division B is an unlawful segregation of races, in violation of the Equal Protection Clause of the Fourteenth Amendment,"

and Mr. Justice Douglas in *Baker* v. *Carr*, 369 U. S. 186, 250 (1962) that "gerrymandering along racial lines" violates the Fourteenth Amendment, should be reaffirmed as the clearly required interpretation of the Amendment.

The State seems to suggest that if a legislature intends to confer *benefit* on a minority group by placing it in a separate district, and in fact does produce such "benefit", this action should be defensible against Fourteenth and Fifteenth Amendment attack (pp. 37-40). This question, however, is not presented for decision in this case, because the record does not (and could not) contain any proof of benefit to raise the question. And there is no doubt that if a "benefit" justification is permitted for segregation racially purposed, proof of benefit is the State's burden as a matter of affirmative defense; *disproof* would not be required as part of a plaintiff's *prima facie* case, (see, further, the discussion, *infra* pp. 8-10, regarding "Standards of Proof").

The State also attempts to argue that this case raises the question of whether state programs whose effect is *integration* may be upheld under the 14th Amendment (pp. 19-20, 37-38). As is clear by now, this is a case where the legislature's purpose and the effect of its legislating were *segregation*, and as is also clear, this Court has long ago decided that the 14th Amendment squarely bars all segregation.* There will be time enough for this Court to decide the State's hypothetical question when a case is brought here properly raising it.

STANDARDS OF PROOF

In ironic contrast with their professed solicitude for racial minorities, the State and Intervenors argue that plaintiffs attacking a racial statute face the same burden of proof as plaintiffs who challenge an economic regulation statute which is concededly free from any invidious racial distinctions. Citing only cases of the latter type, *McGowan* v. *Maryland*, 366 U. S. 420 (1961) (Sunday closing laws), *Morey* v. *Doud*, 354 U. S. 457 (1957) (regulation of freight carriers), *Lindsley* v. *National Carbonic Gas Co.*, 220 U. S. 61 (1911) (regulation of gas company), both the State and the Intervenors maintain that Appellants were obliged under the standards established by these cases affirmatively to disprove every possible basis other than race for the challenged statute (see State Br. 24-25, 27, 32, 33). They both apparently recognize that, unless this heavy burden may be shifted to the Appellants, their now enfeebled attempts to show lack of racial gerrymandering must inevitably fail.

*And this case in no way resembles *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963), cited by the State (pp. 37-38). There the issue was how far a State could go in requiring private businesses subject to its supervision to give *equal* treatment to all prospective employees.

As Appellants have argued (Appellants Br. 30-33), the ultimate issue, and thus the elements of a *prima facie* case and the standards of proof generally, are quite different in racial discrimination cases from the issue, elements and standards obtaining in the cases of the type cited by the State and the Intervenors. In the latter cases, the governing rule is that the states are permitted wide latitude in classifying for economic regulation purposes, so that:

> "When the classification in such a law is called in question, if *any* state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed." *Lindsley* v. *National Carbonic Gas Co., supra,* 220 U. S. at 78. (emphasis added)

Thus, as part of a *prima facie* economic regulation equal protection case, plaintiff must prove the nonexistence of "any state of facts" that could possibly justify the statute as a rational one.

However, when a statute is challenged as having a racial purpose and effect, the ultimate issue is whether or not this purpose and effect exist; for if they do, the statute is *per se* unconstitutional. As Mr. Justice Holmes stated for this Court, unanimously, in *Nixon* v. *Herndon, supra* p. 3 (another case involving the right to vote in Congressional elections):

> "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification involving the right set up in this case" (273 U. S. at 541).

Thus, the *prima facie* burden of a plaintiff in a racial case is merely to show that the statute embodies a racial classification, e.g., *Hernandez* v. *Texas,* 347 U. S. 475 (1954).

Defendants in a suit alleging a racial classification may, of course, attempt to show that the statute in question classifies on a basis other than race, and the appellees had that opportunity in this case, but until proof is introduced in support of such a claim, plaintiffs have no obligation to assume the burden of rebutting it. Any other rule would impose upon plaintiffs in segregation cases a hopelessly difficult burden of proof—a burden which would have the effect of sustaining the most invidious of racial classifications.

THE PROOF IN THIS CASE

As an assuming *arguendo* proposition, stated without conviction, the State says that "there is every reason to infer" that the challenged statute does not constitute a racial gerrymander (p. 24). However, this attempt to assert that the legislature "had no fixed attitude toward race" (p. 28) is hopelessly inconsistent with the argument that the legislature could not possibly have avoided racial gerrymandering, and the admission tacitly made thereby that the legislature has not, in fact, avoided such gerrymandering.

In the course of this unconvincing effort to establish that the challenged portion of the statute rests on bases other than race, the State argues repeatedly that the district lines merely "reflect" the neighborhoods of New York City (pp. 25 and 27). However, this proposition begs the question, which is: why are the boundaries drawn where they are? Any district lines will "reflect" racial compositions of neighborhoods; the issue is not, however, the reflection but the shape of the mirror.

Also question-begging is the State's assertion, presented for the first time in its brief to this Court, that the challenged statute was designed to preserve "existing territorial

alignments" (p. 33).* The answer sought to be assumed is that the prior alignments were constitutionally beyond reproach; for unless those alignments themselves were free from any past history of deliberate desires to segregate racially, any perpetration of them, however innocent if considered alone, would be contaminated by the earlier segregative genesis. *Taylor* v. *Board of Education*, 294 F. 2d 36 (2d Cir.), *cert. denied*, 368 U. S. 940 (1961). *Cf. Eubanks* v. *Louisiana*, 356 U. S. 584, 588 (1958) ("local tradition cannot justify failure to comply with the constitutional mandate requiring equal protection of the laws").

The State recognizes this argument, but attempts to contend that it was absolved of any necessity to demonstrate the constitutional character of past districtings because such districtings were entitled to a "presumption of constitutionality" (State Br. 34). This presumption operates, the State alleges, because "[t]here is no evidence in the record that casts any taint upon the previous districting Acts" (*id.* 19).

Assuming, *arguendo*, that such a presumption is available, it was destroyed in this case because, contrary to the State's assertion, the record was replete with evidence which, to use the State's phrase, "tainted" the previous districting.

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*The State's brief attempts to imply that the State introduced historical maps for the purpose of sustaining this proposition. However, as clearly appears from the record (R. 106, 130-31), these maps were introduced at the request of the Court, for the sole purpose of revealing when the irrational boundaries first emerged, and were not a part of the State's case. It may be of interest for the Court to note from these maps that in 1911, when the total population of Manhattan Island was 2,331,542, and the Negro population thereof was only 60,534 (13th Census of the United States, 1910), the lines dividing Manhattan's Congressional Districts were almost geometrically straight (Defts.' Exh. C, R. 233) (as in Appellant's hypotheticals, Pltfs', Exhs. 6A, 6B, 6C, R. 208-13), while in the 1941 redistricting, when the Island's total population had dropped to 1,889,924 and the Negro population had risen to 298,365 (16th Census of the United States, 1940), the districting lines began to assume their present multi-sided character (Defts'. Exh. F. R. 239).

First, the presentation of proof sufficient to establish *prima facie* the unconstitutionality of the present districting was also sufficient to remove any presumption that may have protected the prior districting. Second, since, as the State's Brief concedes (pp. 8-9), there were only 3 points at which the new statute altered the old district lines, and since Appellants' proof attacked the new statute at more than these three points, Appellants' proof was an attack on unchanged lines established by prior Acts, and thus put into question the propriety of those Acts themselves. For example, the "staircase" borderline between the 17th and 18th Districts, unchanged from the prior Act (except for the additionally suspicious deletion from the 17th District of the "top step" area containing 44.5% non-whites and Puerto Ricans), was the subject of strong proof by Appellants regarding the manner in which census tracts were "cut" to maximize the non-whites and Puerto Ricans in the 18th District and the whites in the 17th District. (R. 52-56, 61-66).

Thus, any presumption of constitutionality the prior districting Act may have enjoyed was destroyed by Appellants' affirmative case. Had the State genuinely intended to rely on the argument that the legislature's purpose was not to gerrymander racially but to build rationally on old lines, it had the burden of re-establishing the constitutionality of those lines.*

*That Appellants alleged but did not prove that the prior districtings were unconstitutional is irrelevant both to the issue of whether Appellants' proved their case and the issue of whether the State could rebut Appellants' case on the "building-on-the-past" theory without establishing the *constitutionality* of the prior districtings. The real question regarding the first issue is not whether Appellants proved all they alleged, but whether what they did prove was sufficient. There is no requirement that a case be overproved, and, in fact, any holding that plaintiffs attempting to show the unconstitutionality of present Congressional districting must show a similar infirmity in all predeces-

But even if the State could, in some fashion, have re-established the constitutionality of the prior district lines, it still could not have availed itself of the argument that the purpose of the 1961 districting was to build rationally on such lines—because the 1961 districting did not, in fact, so build. The reduction in the number of districts from 6 to 4 effectively undermined existing territorial alignments, and, contrary to the State's assertion that the 17th District is "little changed" from its predecessor (p. 7), the changes in the 1961 statute had the effect of adding to that district 122,000 people (R. 216) more people than there are, for example, in Trenton, New Jersey. Moreover, these additions occurred in areas which are not anywhere explained as being either rational or inevitable changes in the old district. Rather the overwhelming reason for the changes in the boundaries of the 17th, as Appellants' proof shows, was the desire to bring about the homogeneous racial compositions of the 17th and 18th Districts.

Both the State and the Intervenors have attempted to manipulate the record to obscure the clear picture of racial gerrymandering which it presents. Although the State characterizes as "commonplace" the fact of adjoining districts with an all-white population of 95%, and an all-Negro and Puerto Rican population of 86%, respectively (p. 25), it is hard to imagine how higher percentages could be achieved in any urban area. Also, neither the State nor Intervenors anywhere attempt to explain why the 17th District is 63,000 persons smaller than the adjoining 19th.

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sors would be both irrational and would impose an impossibly expensive and time-consuming burden.

The discussion in the prior section of this brief regarding allocation of burdens in a racial segregation case, and the *Taylor* and *Eubanks* cases cited in the body of this section show clearly that the State had the burden of establishing the prior districts' constitutionality in the circumstances of this case.

43,000 persons smaller than the average for the Island, and 27,000 less than the average for the State as a whole in the face of Appellants' proof that equalization with the other districts by extending the district lines in any direction would at the very least double the number of Negroes and Puerto Ricans in the 17th district (R. 77 *et seq*). Nor do they explain why the boundaries of the 17th and 18th are so obviously gerrymandered, with the other districts being only filler districts. Finally, no attempt is made to indicate why, although the population of Manhattan Island dropped, in absolute terms, from 1,960,101 in 1950 to 1,698,281 in 1960, and the number of Negroes on the Island rose from 384,482 to 426,459,* the percentage of non-whites and Puerto Ricans in the 17th District decreased from 6.6% to 5.1% (R. 216).

The State and the Intervenors attempt to overcome the force of the record facts by suggesting that certain additions could have been made to the 17th District had the legislature intended to maximize its all-white character. They refer to the area on the northern boundary of the 17th District containing 10,507 persons with less than 5% Negro and Puerto Rican. Addition of this area would still leave the 17th vastly smaller than the other districts, and much below one-fourth of the Island's population. Also, since, as the State argues, "it is assumed that all relevant facts are before the legislature." (p. 36), it may be assumed that the legislature knew of the low-cost housing project (shown by Appellants' Exhibit 3 (R. 214) to be of a type generally 73.4% non-white and Puerto Rican in occupancy) that was to be constructed in that area and of the general push southward of the Negro and Puerto Rican population. Thus, the legislature may be assumed to have recognized that this area was but a temporary buffer zone

*17th and 18th Censuses of the United States, 1950 and 1960.

which would permit the 17th and 18th districts to retain their racially homogeneous character for another 10 years.*

The State also argues (p. 28) that there are "many census tracts" on the southern boundary of the 17th which could be added to the 17th without increasing its percentage of Negro and Puerto Rican voters. However, these tracts encompass warehouses and manufacturing areas in which virtually no people reside, and they could be added to the 17th only by bisecting the 19th or otherwise vastly increasing the amount of gerrymandering in the district lines (R. 100). In sum, the State has been unable to find any areas outside of the 17th which a racially-motivated legislature would have added to it. On the contrary, the record clearly establishes that extension of the lines of the 17th Congressional district so as to make its population equal to approximately one-fourth of the total population of Manhattan Island would have substantially increased both the number and percentage of non-whites and Puerto Ricans in the district (R. 79-87).

Quite surprisingly, the State also suggests (p. 28) a number of deletions from the 17th which could increase its racial homogeneity. But all of these suggestions would have the effect not only of further reducing the population of the 17th, and adding to the population of the already under-represented adjoining districts, they would also significantly increase the amount of gerrymandering in the district lines. If the 17th were further reduced by these deletions, and the district were expanded elsewhere to make up for the reductions, the percentage of non-whites and Puerto Ricans in the district would be much greater than at

*The State attempts to remedy its failure to introduce rebuttal evidence by going outside the record to give figures which purport to break down the population of the area concerned. However, there is no evidence in the record to show that the census tracts referred to by the State in its footnote on page 10 are the tracts which are involved in the testimony to which the State refers.

the present time. In other words, to maintain this line of argument, the State must show not only deletions which could be made but also equivalent additions elsewhere to recoup the loss in population—which additions do not, at the same time, increase to an even greater extent the 17th District's non-white Puerto Rican population. As seen above, the State has failed to do this. As seen by Appellants' Exhibit 4b (R. 204), it cannot be done.

The same holds true for the straightening of the western boundary of the 17th. As the State concedes (p. 12), the straightening would reduce the population of the 17th by 19,000 persons (double that of the only addition which they suggest). This would increase the percentage of Negroes and Puerto Ricans in the district, and, if the reduction of 19,000 persons were made up elsewhere, there would be an even greater increase in the percentage of such persons.

Moreover, none of the deletions suggested by the State would significantly reduce the 17th's non-white Puerto Rican population. The small triangular area on the south-eastern boundary of the 17th contains only 1,062 persons, of which only 381 are non-whites and Puerto Ricans (R. 74), and its deletion would therefore have little impact one way or the other upon the composition of the district, except to increase the irregularities of the lines. Similarly, the area between 34th and 42nd Streets and Sixth and Eighth Avenues on the Western boundary of the 17th contains only 758 persons, of which a maximum of only 265 are non-whites and Puerto Ricans (R. 71-72), and its deletion would also be insignificant. Intervenors have erroneously suggested that there is a strip along First Avenue between 14th and 19th Streets which was excluded from the 17th and contains a population 95% white. Intervenors have simply misread the evidence and the statute since no such strip has been excluded from the 17th district.

The State attempts unsuccessfully to explain the two inexplicable omissions from the 17th. The first is the area which is 44.5% non white and Puerto Rican (R. 85, 86) between 98th and 100th Streets and Fifth and Madison Avenues which was dropped from the reconstituted district, an action which the State explains on the grounds that a hospital is located there. However, there is nothing to indicate that the same hospital was not in the same place at the time of prior redistrictings, or to rebut the picture presented in Defendants'. Exhibits G and H (R. 240-43) showing that the only change was to move the northern boundary of the 17th from 100th Street down to 98th. Defendants' maps show no elimination of any street or other change in the area concerned. The second is the inexplicable loop in the district lines caused by the failure to include in the 17th the area between First and Third Avenues and 14th and 19th Streets (containing 12.2% Negroes and Puerto Ricans). The State attempts to explain this omission on the ground that this area "is no more or less contiguous to the rest of the district than is Stuyvesant Town" (p. 29). However, it is clear that had this 10-block area been added to the 17th there would be no loop in the boundary of the 17th, which is what Appellants meant when they said it was more logically contiguous.

JUSTICIABILITY

The State attempts as a last resort to argue that this case is not justiciable under the Constitution. However, its justiciability is clearly established by *Gomillion* v. *Lightfoot*, 364 U. S. 339 (1960), and by *Baker* v. *Carr*, 369 U. S. 186 (1962). In *Gomillion*, a suit based on charges of racial gerrymandering, this Court held that a challenge to an Alabama Statute fixing municipal boundaries was "within conventional spheres of constitutional litigation," while

Baker and most of the cases following it have established that federal courts will adjudicate suits challenging districting statutes even in the absence of allegations of such gerrymandering.*

Although *Baker* involved state rather than Congressional Districts, this Court made clear that its holding on the question of justiciability applies *a fortiori* in a suit challenging Congressional Districts, by stating:

> "*Smiley, Koenig* and *Carroll* [285 U. S. 355, 375, and 380 (1932) respectively] settled the issue in favor of justiciability of questions of Congressional redistricting." (369 U. S. at 232)

A suit involving Congressional districting requires no intrusion into the internal politics of a state, as in the case of *Baker*, but only limitations upon the State's role in prescribing the manner of electing members of the U. S. Congress, a role specifically delegated to the State by Article I, § 2 of the Constitution and by 2 U. S. C. § 2a.

Enough has been said by others which conclusively establishes the justiciability of cases involving Congressional Districts that further elaboration is not needed here. We would only refer to the argument of the United States as *amicus curiae* in No. 22, this Term, *Wesberry* v. *Sanders*. See also, Black, *Inequities for Districting for Congress; Baker* v. *Carr* and *Colegrove* v. *Green*, 72 YALE L. J. 13 (1962).

SEVERABILITY AND RELIEF

Defendants and Intervenors assert that the challenged portions of Chapter 980 are inseparable from the rest of

*It should be emphasized that the fact that Congress is empowered by Section 5 of the 14th Amendment to remedy racial segregation has never been held to preclude the courts from adjudicating cases attacking racial segregation.

the Statute and that if the Court were to strike down the invalid parts, it must invalidate the entire Statute.

Appellants do not contend that Chapter 980 is in its entirety invalid; they do not dispute the boundaries established for the remaining 37 districts set forth in the Statute.

"It is an elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected" (*Allen* v. *Louisiana,* 103 U. S. 80, 83). The criterion is "whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible to give effect to what appears to have been the intent of the Legislature if those provisions are stricken out" (*Allen* v. *Louisiana, supra*).

Judge Cardozo, speaking for the New York Court of Appeals, expressed the guiding principles thus (*People ex. rel Alpha P. C. Co.* v. *Knapp,* 230 N. Y. 48, 60):

> "In this state, we have gone far in subdividing statutes, and sustaining them so far as valid . . . The tendency is, I think, a wholesome one. Severance does not depend upon the separation of the good from the bad by paragraphs or sentences in the text of the enactment. The principle of division is not a principle of form. It is a principle of function. The question is in every case whether the legislature, if partial invalidity had been foreseen, would have wished the statute to be enforced with the invalid part exscinded, or rejected altogether. The answer must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots."

The provisions of the Statute here attacked are separate and independent from its other provisions. New York County is a self-contained geographical unit; within its overall boundaries there are four Congressional districts.* A determination that those four Congressional districts within the County should be differently described would not upset any of the remaining districts throughout the State, nor affect the election of Congressmen from any of the other districts in the State. Retaining the other parts of the Statute without the invalid ones would not, therefore, "cause results not contemplated or desired by the Legislature." (*Connolly* v. *Union Pipe Co.*, 184 U. S. 540, 547). Except for the four representatives from New York County, the Congressional representatives from New York may be regularly chosen in primary and general elections from the districts established by the Statute, and the election of Congressmen from other Congressional districts throughout the State would not be jeopardized if the elections of the Congressmen from New York County proceed under alternative plans.

Where a statute, such as this, affects differently each portion of the State, it is beyond the bounds of reasonableness to assume an intent on the part of the Legislature that one portion of the statute, affecting one county within the state, if held invalid, will destroy the entire enactment. The legislative intent may be reached "pragmatically by the exercise of good sense and sound judgment." The remaining districts established by the Statute may serve the function intended though the four districts established in New York County are rejected. Upon a declaration of the invalidity of the boundaries of the four New York

*The State is simply in error in the assertion, in the footnote on page 6 of its brief, that a portion of the 20th District is on the northern side of the Harlem River, and thus on the mainland (R. 131, 148).

County districts, the Legislature at a Special Session could redefine those boundaries validly. But if the entire Statute were struck down, and the former statute again became operative because Chapter 980 was wholly void, there would be more districts within the State than representatives apportioned to it; and the Federal statutes would then require elections at large throughout the State. This would indeed create a chaotic condition and would cause results neither contemplated by the Legislature nor necessary to enforce Appellants' rights.

The State also attempts to argue that relief is impossible because the cure would be worse than the disease. This argument is based upon the invalid assumption that the only ultimate relief would likewise be elections at large on a state-wide basis. Even assuming the State Legislature would not on its own initiative correct any unconstitutionality declared by this Court, there are clearly alternatives to state-wide elections at large. If a special master is deemed undesirable, then elections at large could be held limited to New York County and the four Congressmen from Manhattan Island.

Although the State attempts to argue that 2 U. S. C. § 2(a)(c)(5) carries a negative implication that elections at large on a less than state-wide basis are not permitted, that statute mandates state-wide at-large elections only in the limited situation in which a state whose representation in Congress has been reduced has failed to enact a redistricting statute. Nothing in 2 U. S. C. § 2(a)(c)(5) would prevent the States from holding at-large elections, either local or state-wide, in any other situation, and the broad equity power of the Federal Courts to grant appropriate relief is surely sufficient to permit the ordering of elections at large limited to Manhattan Island. The legislature has chosen in its statute to treat Manhattan Island as a separate

entity, and a Federal Court should not be barred from doing likewise.

The suggestion of the State (p. 59) that an at-large election limited to Manhattan would possibly "diminish the influence of Negroes and Puetro Ricans in Manhattan" is patently absurd. The last two presidents of the Borough of Manhattan (elected at-large) have been Negroes, and, with nearly 40% of the population, it is inconceivable that Negroes and Puerto Ricans would have less influence in such an election than they have presently as a result of being largely concentrated in a single district, and almost completely excluded from another.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed.

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